Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

NO. 80-22

ORGANIZZAZOINE NAVOBI ITALIANA
(URUGUAY), S. A. and
ORGANIZZAZIONE NAVOBI ITALIANA
Petitioners

versus

TRANS INTERNATIONAL AIRLINES

PETIEION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

The petitioners hereby pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit rendered in these proceedings on March 14, 1980, for which an application for rehearing was denied on April 10, 1980;

OPINIONS BELOW

The opinion of the Court of Appeals, issued as an unpublished order, appears at Appendix A *infra*; the order of the Court of Appeals, denying rehearing, appears at Appendix B, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was issued on March 14, 1980 (Appendix A); an application for rehearing was filed and was denied by order dated April 10, 1980 (Appendix B). This petition for certiorari was filed less than 90 days from the denial for rehearing. The jurisdiction of this Court is invoked pursuant to 28 USC 1254 (1).

QUESTIONS PRESENTED

Petitioners sought review by the United States Court of Appeals for the Seventh Circuit of a ruling made by the district court during the course of a two week jury trial. In a cross-appeal, the defendant sought relief from the jury's determination of its liability for breach of contract, a reduction of the damages awarded, and a review of the trial court's denial of its various post trial motions. Petitioners are herein seeking relief from certain portions and orders issued by the Appellate Court as a result of these appeals. The questions raised for review are:

1. Whether the remittitur ordered by the Appellate Court, which eliminated all sums awarded for an injury not capable of precise valuation, and with out offering petitioners the alternative of a new trial in lieu of remittitur, was an abuse of its judicial authority and a deprivation of petitioners' right to trial by jury.

2. Whether the Appellate Court's review and determination of the trial court's dismissal of petitioners' tort claim was based on an inappropriate standard which thereby deprived petitioners of their statutory right of review and which further violated their right to trial by jury.

STATEMENT OF CASE

Organizzazione Navobi Italiana (Uruguay) S. A., (ONI-USA), an Uruguayan corporation and Organizzazione Navobi Italiana (ONI), an Italian corporation, filed suit in federal district court for the southern district of Indiana on October 17, 1975, against Trans International Airlines (TIA) and Radio Corporation of America (RCA), asserting a dual cause of action against both parties for breach of contract and for tortious interference by the defendants in the plaintiffs' contractual relationships with certain third parties. A supplemental petition reasserting both causes of action, joined Atlantic Container Lines, a multi-national corporation, as a defendant. Prior to trial, both RCA and ACL were granted motions for summary judgment. On March 19, 1979, trial by jury commenced against TIA. After two weeks of trial, a verdict in general form was rendered awarding ONI $60,000 and ONIUSA $350,000 as damages for defendants' breach of contract.

Three days prior to trial, TIA filed a motion to dismiss petitioners' tort claim for tortious interference pursuant to Rule 12 (B) (6), F.R.Civ.P. (Appendix C). After extensive argument, the trial court dismissed this cause of action on the basis that it did not state a recognizable cause of action under state law (Appendix D).

Judgment on the verdict was entered by the trial court on April 3, 1979 and TIA filed the appropriate post trial motions seeking a review of the jury's finding of liability and a reduction of the damages awarded. These motions were denied by the trial court on June 12, 1979 (Appendix E). Both parties filed timely appeals to the United States Court of Appeals for the Seventh Circuit. Petitioners sought review of the propriety of the trial court's determination of the defendants' 12 (B) (6) motion, while the defendants challenged the jury's finding on liability, the amount of damages awarded, and the trial court's denial of its post trial motion for relief.

The Court of Appeals issued its unpublished opinion on March 14, 1980; it sustained the trial court's dismissal of petitioners' tort claim and upheld the jury's determination of liability, but ordered the judgment reduced from a total of $410,000 to $109,499. (Appendix A). Petitioner filed an application for rehearing, which was denied on April 10, 1980 (Appendix B).

CONSTITUTIONAL AND FEDERAL PROVISIONS INVOLVED

Seventh Amendment to the United States Constitution:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall

be presented, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

REASONS FOR GRANTING THE WRIT

I.

THE APPELLATE COURT'S REVIEW AND ORDER MODIFYING THE JURY'S AWARD TO PETITIONERS WAS IN CONFLICT WITH PRIOR CASES OF THIS COURT AND AN ABUSE OF ITS JUDICIAL AUTHORITY RESULTING IN A DEPRIVATION OF PETITIONERS' RIGHT TO TRIAL BY JURY IN THAT:

1. The remittitur, ordered was not a reduction of damages, but was an elimination of all damages awarded for a specific injury, and thus a usurpation of a jury function;

2. The order of remittitur, without granting petitioners the alternative of a new trial, deprived petitioners of their right under the Seventh Amendment;

The precise question presented for review concerns the propriety of the Appellate Court's order reducing a jury's verdict from a total of $410,000 to $109,449.

In denying the defendant's post trial motions, seeking a reduction of the damages, the trial court found that "the damages award given by the jury was not speculative". However, in its review and opinion, the Appellate Court found that the entire verdict, in excess of $109,499 was "too speculative to be sustained".

It is essential to point out at the beginning of this discussion that the plaintiffs do not dispute or bring into question the inherent power of either a trial court or appellate court to review the size of a verdict, and to either increase it or decrease it in accordance with the appropriate standards. This authority has consistently been recognized and sanctioned by this Court, *Koenigsberger v Richmond Silver Mining Co.*, 158 U.S. 41,15 S. Ct. 751, 39 L. Ed. 889 (1895); *Dimick v Schiedt*, 293 U.S. 474, 55 S. Ct. 296, 79 L. Ed. 603 (1935); *Grunenthal v Long Island Ry. Co.*, 393 U.S. 156, 89 S. Ct. 331, 21 L. Ed. 2d 309 (1968). However, petitioners submit that the specific remittitur in question is inconsistent with the principles and procedures recognized as proper by this Court and a direct usurpation of the function of the jury.

I. The remittitur ordered was not a reduction of damages, but was an elimination of all damages awarded for a specific injury, and thus a usurpation of a jury function;

The proper distribution of functions between the judge and jury as determined by federal law, has consistently been recognized as of paramount importance in insuring litigants their constitutional right to trial by jury. *Byrd v Blue Ridge Rural Electric Co.*, 356 U.S. 525, 78 S. Ct. 893, 2 L. Ed. 2d 953 (1958); *Herron v Southern Pacific*, 283 U.S. 91, 51 S. Ct. 893, 75 L. Ed. 857 (1931). It is submitted that when the jury's basic function as trier of fact is usurped by a reviewing court, either directly or indirectly by the effect of a ruling, this constitutional right has been denied. In the present instance, the ruling of the Appellate Court modifying the amount of damages awarded is in direct conflict

with the jury's function under Indiana law to resolve the factual issues regarding the existence of damages and the elements for which compensation should be given. *Garland v Johnson*, 504 F2d 1198, 1202 (7 Cir., 1974); *Alderman Ford v Bailey*, 291 NE 2d 92, 103 (Ind. App., 1972).

Certain precise elements of damage, and the value of these elements, were not disputed by the defendant. However, in addition to these precise elements, the petitioners sought recovery for damage to their business reputation and subsequent loss of good will. The defendant did not contest petitioners' right to seek recovery for these injuries, and no issue was raised on appeal concerning the propriety of the trial court's instructions to the jury regarding its determination of the amount of damages. The Appellate Court did not find that an award for these injuries would be improper, only that the evidence as to the value of the injury was speculative. However, by the complete elimination of all damages in lieu of a reduction, the Appellate Court rejected the jury's factual determination that these injuries had been sustained. In so doing, it clearly altered the jury's factual resolution in a matter of substance, thus exceeding the scope of its powers of review. *Myrtle v Checker Taxi Co., Inc.*, 279 F2d 930, 934 (7 Cir., 1960); *Garland,* supra, 504 F2d at 1202.

In reviewing a jury's evaluation of damages, Indiana courts have formulated a standard consistent with this Court's:

> When it is found that harm has been caused and the only uncertainty is as to the dollar value of the harm, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatsoever.

American Fletcher v Flick, 252 NE2d 839 (Ind. App., 1969); see also, *Kroger v Haun*, 379 NE2d 1004, 1017 (Ind. App., 1978); see also, *Stanish v Polish Roman Catholic Union*, 484 F2d 713 (7 Cir., 1973);

This Court, when faced with a similar issue, noted that ". . . while damages . . . may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." see, *Story Parchment Co. v Paterson Co.*, 282 U.S. 555, 562-63 (1931). Thus, it is clear that mere difficulty in ascertaining the exact value of an item of damage should no longer be confused with a right to recover for that item. This concept has been adopted by the Indiana courts:

> Less certainty is required to prove the amount of the loss than is required to prove the fact that profits were in truth lost.

Kroger, supra, 379 NE2d at 1017; *Alderman Ford*, supra, 291 NE2d at 106.

This first standard was met by the testimony offered by the plaintiffs, a fact clearly recognized by the trial court in its denial of the defendant's post trial motions, and not challenged by the Appellate Court in its review of the record.

In the instant case, multiple elements of compensatory damages were submitted to the jury for its determination, and its conclusion was rendered by a verdict in general form. Under the Seventh Circuit's own guidelines, it is improper for a reviewing court to attempt to segregate out elements of a jury's determination by substituting its own assessment

of proven damages on legitimate elements of an injury. This limitation is especially applicable when reviewing an award rendered for injury to reputation and loss of good will, elements which are inherently capable of great elasticity in the hands of a jury. *Durnat v Surety Homes*, 582 F2 1081 (7 Cir., 1978). The proper standard of review in these instances, as in all instances regarding a challenge to the amount of a verdict, is limited to the question of whether the trial court abused its discretion in sustaining the amount of the verdict in ruling on a defendant's post trial motion, and whether the amount of the verdict was so "gross or monstrously excessive" as to shock the conscience of the court. *Bucher v Krause*, 200 F2d 576 (7 Cir., 1952), cert. denied, 345 U.S. 997, S. Ct. 1141, 97 L. Ed. 1404; *Garland,* supra, 504, F2d at 1199; see also, 11 *Wright & Miller, Federal Practice and Procedure* (Civil) sec. 2820 at pp. 127-136. The Appellate Court's order did not merely reduce the damages in question, but eliminated the total amount. Thus, its modification was a judicial determination that the damages sustained were of no value, a finding completely at odds with that of the jury's and totally violative of the plaintiffs' right to have this decision made in accordance with its constitutional right to trial by jury. The modification amounted to a substitution of an Appellate Court's opinion as to the proper evaluation of a certain injury in place of the jury's opinion, an action which exceeds the permissible limits of judicial review and usurps a jury function mandated under both state and federal guidelines.

The Appellate Court ignored the fact that the trial court had previously ruled on the precise question presented in its denial of defendants' post trial motion seeking a reduction of damages. The Seventh Circuit has stated that on appeal, its scope of review on the question of excessive damages would be limited to a review of the trial court's

treatment of any motion for a new trial, with the issue limited to whether the trial court's ruling was an abuse of discretion. *Hahn v Becker*, 588F2d 768 at 771 (7 Cir., 1979). citing *Bucher v Krause*, supra. The Appellate Court did not find the award so outrageous as to "shock the judicial authority", nor did it find that the trial court's post trial ruling was an abuse of discretion. Instead, it independently reviewed the record and formulated its own opinion as to the quality of evidence concerning evaluation of the injury in question, a resolution which is uniquely factual, and not appropriate for a court's consideration or determination. The nature of the injuries for which the damages in question were awarded were such that precise calculation was impossible; therefore, the jury's determination of the value was its estimation after considering all the evidence. Although the Appellate Court may have disagreed with this evaluation, the substitution of its opinion exceeded its judicial authority to modify the amount of damages awarded, and invaded the jury's function as the trier of fact.

II. The order of remittitur, without granting petitioners the alternative of a new trial, deprived petitioners of their rights under the Seventh Amendment;

An order of remittitur has consistently been viewed as a viable alternative to ordering a new trial, should the plaintiff agree to accept the modification. However, the modification at issue failed to afford petitioners this alternative and this failure is a deprivation of petitioners right to trial by jury.

In addressing this precise issue, Judge Lindley of the Seventh Circuit concluded that,

> "(the) trial court may not arbitrarily reduce damages; it must afford plaintiff the opportunity to make remittitur if he desires . . . (or) . . . grant a new trial . . . For either the trial court or the appellate court arbitrarily to reduce damages to a lesser amount is wellnigh to deprive plaintiff of a right to a jury trial."

Bucher v Krause, supra, 200 F2d at 588; see also, *Brewer v Uniroyal*, 498 F2d 973 (6 Cir., 1974);

The *Bucher* rationale is in complete accord with the procedures recognized and sanctioned by this Court as appropriate in matters involving remittitur, see, *Koenigsberger*, supra, 158 U.S. at 52-53; *Dimick*, supra, 293 U.S. at 476, 482-83, 484-85; see also, *Grunenthal v Long Island Ry*, supra; see also, *Wright and Miller*, supra at sec. 2820, p. 134.

It is respectfully submitted that the Appellate Court's modification of the jury's verdict presented for review is an unwarranted enlargement of its power to order a remittitur and is, in fact and law, a deprivation of petitioners' right to trial by jury. The procedure utilized is in direct conflict with this Court's prior decisions, and thus presents a classic issue regarding the limit of an appellate court's power of review and modification and the procedures which must be followed in the exercise of its power to alter a determination properly made by a jury.

Therefore, this Court is petitioned to vacate the order of the Seventh Circuit Court of Appeals and reinstate the original amount of the judgment, or in the alternative, to amend

the order so as to grant petitioners the option of a new trial on the issue of damages in lieu of remittitur.

II.

THE APPELLATE COURT'S REVIEW AND DETERMINATION OF THE TRIAL COURT'S DISMISSAL OF PETITIONER'S CLAIM FOR TORTIOUS INTERFERENCE WAS BASED ON AN ERRONEOUS STANDARD.

The precise question presented for review is the propriety of the standards utilized by the Appellate Court in reviewing the trial court's grant of a motion to dismiss for failure to state a claim, filed by the defendant pursuant to Rule 12 (B) (6), F. R. Civ. P. (Appendix C).

The motion, filed three days prior to trial, contested plaintiff's right to seek recovery from the defendant for its alleged tortious interference with the contracts between the plaintiffs and certain third parties, including the government of Uruguay.

This motion was subject to much debate; however, the scope of the motion and argument was limited to a question regarding the sufficiency of the pleadings, as was the trial court's ruling. (Appendix D, pp. 3-11, 24-42, 47-51). At no time did the trial court consider or pass on any matter outside the scope of the pleadings. In response to the petitioners' appeal on this ruling, the Appellate Court concluded that:

> Under the circumstances of this case, TIA is not liable in tort . . . (and) the district court's grant of partial summary judgment for the defendant . . . is affirmed.

In its review of this question, the Appellate Court obviously reviewed the factual sufficiency of the plaintiffs' claim in reaching its conclusion. However, in doing so, it disregarded the fact that the petitioners were barred by the trial court's ruling from presenting any evidence on this issue during trial. The Appellate Court also failed to recognize that the "factual" issues involved were not subject to any pre or post trial scrutiny or evaluation by the trial court. Its ruling was restricted to the very narrow issue raised by a challenge to the sufficiency of the pleadings.

Thus, the impropriety of the Appellate Court's consideration and resolution of the question is apparent when contrasted with the precise and narrow issue ruled on by the trial court. If the Appellate Court's conclusion was based on a misunderstanding of the trial court's ruling, then the precise issue in question is similar to that resolved by this Court in *Carter v Stanton*, 405 U. S. 669, 92 S. Ct. 1232, 31 L. Ed. 2d 569 (1972). In a *Per Curiam*, this Court stated that where a district court's order was "opaque and unilluminating" as to the facts or law relied upon in ruling on a claim, any judgment rendered should be vacated for further proceedings. *Carter*, 92 S. Ct. at 1234. It cannot be argued that an appellate court has any less responsibility in this regard than would a trial court. Likewise, if the Appellate Court has expressed no views on the controlling issue or not properly considered the issue in question, the question should be remanded. see generally, *Dandridge v Williams*, 397 U.S. 471, at 476, 90 S. Ct. 1153, at 1156, 25 L.Ed. 2d 491 (1970), and cases cited therein at footnote 6.

In the instant issue, the question presented to the Appellate Court was whether as a matter of law, a cause of action for tortious interference with the contractual relationships between plaintiffs and third parties, which did not involve

the element of inducement by the defendant, constituted a valid cause of action under Indiana law. By basing its decision on a determination of the factual merits of petioners' claim, the Appellate Court failed to respond to the issue presented for its review, but unilaterally concluded that the factual basis of petitioners' tort claim was insufficient. This ruling is in conflict with the Seventh Circuit's own standard for review of a 12 (B) (6) issue, which allows dismissal only when "plaintiff can prove no set of facts in support of his claim which would entitle him to relief." see, *Stein v U.S. Gypsum*, 547 F2d 1329 (7 Cir., 1977); *French v Heyne*, 547 F2d 994 (7 Cir., 1976); see also, 5 *Wright and Miller; Federal Practice and Procedure* (Civil), sec. 1357. Thus, it is submitted that the consideration and ruling of the Appellate Court deprived petitioners' their right to appeal a contested ruling, and because of the Appellate Court's factual determination, was usurpation of plaintiffs' right to a trial by jury on all factual issues. It is submitted that petitioners' cause of action for tortious interference involves a theory of liability which, while it may be novel, is not extreme. As noted by Professor Charles Wright, in these instances, courts should be "especially reluctant to dismiss on the basis of pleadings . . . since it is important that new theories be explored and assayed . . . " see, 5 *Wright and Miller*, supra, at sec. 1357, p. 603. In view of the recent observations contained in section 766 (A) of the American Law Institute's *Restatement (2d): Torts* (1979), the merits of petitioners' cause of action deserve a full hearing and determination, both of which were denied them.

For these reasons, it is respectfully submitted that the judgment of the Appellate Court should be remanded for a proper resolution of the vital issues involved.

CONCLUSION

For the reasons cited in the foregoing discussion of the questions presented, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

RESPECTFULLY SUBMITTED:

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APPENDIX A

ORGANIZZAZIONE NAVOBI ITALIANA
(Uruguay), S. A. and
ORGANIZZAZIONE NAVOBI ITALIANA
Plaintiffs-Appellees,
Cross-Appellants,

versus

TRANS INTERNATIONAL AIRLINES,
Defendant-Appellant,
Cross-Appellee.

Nos. 79-1842, 79-1842

United States Court of Appeals
Seventh Circuit

Argued February 27, 1980 - March 14, 1980

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.

Before SUTHER M. SWYGERT and PHILIP W. TONE, Circuit Judges and NICHOLAS J. BUA, District Judge.[1]

No. IP 75-601-C

WILLIAM E. STECKLER, Judge.

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[1]The Honorable Nicholas J. Bua, United States District Judge for the Northern District of Illinois, sitting by designation.

ORDER

A brief summary of the facts seems appropriate despite our disposition of this case by an unpublished order. Organizzazione Navobi Italiana (ONI) is an Italian corporation engaged in manufacturing and selling dry cattle feed. Organizzazione Navobi Italiana (Uruguay) S. A. (ONISUA) is a Uruguayan subsidiary of ONI formed to export veal calves from Uruguay to Europe.

In 1973 the government of Uruguay, in agreement with the government of Italy, granted ONI and ONIUSA an exclusive concession to export calves to Europe and to import the ONI feeding process into Uruguay. The concession required the exportation of ten thousand calves to Italy during the first year of the program. If the requirement were met, ONIUSA would then have the right to export fifty thousand calves per year for the next four years.

In early 1974 ONI contacted Incotrans, the Italian representative for Atlantic Container Line Services, Ltd. (ACL), an international charter broker. Through a series of telex communications from ONI to Incotrans to ACL to Trans International Airlines (TIA), and back, TIA contracted to fly a load of calves for ONI in February 1974. The flight was completed.

It was not profitable for TIA to fly empty airplanes. From its perspective, the transport of calves from Uruguay depended upon its ability to arrange positioning flights. For the most part, such flights entailed transporting goods from the United States, where TIA is based, to somewhere near Uruguay. Similar flights were then arranged for May 15 and May 19, 1974 and a third in June. When the May and June flights were arranged, TIA anticipated that it would obtain

a contract to ship television sets from Indianapolis to Chile. The television shipment contract never was consummated, and shortly before the first scheduled May flight, TIA cancelled all three ONI flights.

After the flights were cancelled, the 1,600 calves intended for shipment were returned to quarantine. Additional feed and other costs were incurred. Before arrangements for their transport could be made, approximately 1,200 calves died. The plaintiffs failed to meet their export requirement for the first year of the concession, and therefore the concession was lost.

On July 15, 1974 an unforeseen event occured. The European Common Market placed an embargo on the importation of live claves into member countries from nonmember countries.[2]

Attempting to recover from their misfortune, ONIUSA and ONI brought this action againse numerous defendants, all of whom were granted dismissals, except for TIA.[3] The plaintiffs asserted two causes of action against TIA: (1) breach of contract and (2) tortious interference with contractual relations between ONI and ONIUSA and various

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[2]TIA argues that it was the embargo, and not the cancellation of the flights which caused the plaintiffs no to meet the export requirement. The plaintiffs argue that but for the flight cancellations they would have met the requirement despite the embargo. In view of our disposition of the case, we need not resolve this dispute.

[3]The propriety of the dismissals granted the other defendants is not challenged in this appeal.

third parties. Prior to trial the tort cause of action was dismissed for failure to state a claim. On the breach of contract claim, the jury awarded ONI $60,000 in damages and ONIUSA $350,000. Both parties appeal.

The plaintiffs contend that the district court improperly dismissed their cause of action for tortious interference with contractual relations and that its repeated refusals to reinstate that claim were abuses of discretion. Regarding the breach of contract, defendant contends that: (1) certain documents were improperly admitted into evidence; (2) it was foreclosed from presenting evidence on a crucial factual issue; (3) there was insufficient proof that a contract existed; and (4) the award of damages is not supported by the evidence.

I

TIA's argument that there was no contract is without merit. There was sufficient evidence to support the jury's finding that Incotrans was TIA's agent, that it had authority to contractually obligate TIA to transport the calves from Uruguay to Italy, and that it did so.

TIA next argues that the district court improperly admitted certain telex communications, especially those between Incotrans and ONI, upon which the plaintiffs rely to prove the existence of the contract. The defendant maintains that these documents constitute hearsay and fail to meet any of the exceptions to the hearsay rule. Rule 801 (d) (2) (c), Federal Rules of Evidence, provides that statements are not hearsay if they are offered against a party and are "a statement by a party authorized by him to make a statement concerning the subject." Application of this rule depends in turn on the application of agency principles. TIA

communicated with ONI by telex through its agent Incotrans and the latter's agent ACL. Clearly, the declarants, Incotrans and ACL, were authorized to speak for TIA on the subject of the intended May and June flights. TIA also says that the documents in question were not properly authenticated. They were received by ONI during the normal course of business and as the result of prior conversations in reference to the flights. Applying Rule 901, Federal Rules of Evidence, we hold that there was sufficient authentication to allow the exhibits to be admitted into evidence.

TIA's contention that it was improperly foreclosed from offering evidence regarding the agency issue is not persuasive. TIA claims that the district court committed reversible error when it refused to allow TIA's witness to state whether TIA appointed ACL as its agent. Even if the district court should have allowed TIA.s witness to answer the question, the court's failure to do so, in light of the extensive proof TIA was allowed to submit, is not a sufficient basis upon which to cause a reversal.

Finally, with respect to damages, plaintiffs offered proof that as a result of TIA's failure to fly the calves, they suffered the following damages:

Dead calves - ONIUSA	$52,560
Increased cost to purchase other calves - ONIUSA	4,000
Extra feed - ONIUSA	6,959
Food and medicine - ONIUSA	6,800
Burial expense - ONIUSA	3,470
Transport expense - ONIUSA	1,862
Extra milk - ONIUSA	27,058
Import tax - ONI	6,790

These items total $109,499. Plaintiffs also offered testimony that they suffered injury to their business reputation and that they lost profits from future cattle transactions because their failure to meet the export requirement resulted in the loss of the Uruguayan concession.

Plaintiffs concede that the amount of the verdict exceeding $109,499 does not represent damages for lost profits.[4] TIA claims that the surplus cannot be sustained as compensation for injury to the plaintiffs' business reputation both because such losses were not forseeable and because, in any event, the amount of such losses is purely speculative.

Even if damages for the injury to plaintiffs' business reputation or loss of good will are recoverable, there is virtually no evidence of the value of such injury. All that the record contains is the testimony of ONI's director and ONIUSA's vice-president that such injury occurred. Nowhere is there an estimate of its value. Also, the record is devoid of any evidence upon which a reasonable estimate of the value could be made.

Under Indiana law, which governs this case by the parties' stipulation, "there must be some evidence on which to base an award of substantial damages." *America Fletcher Nat'l Bank & Trust Co. v Flick,* 252 N. E. 2d 829, 847 (Ind. 1979); *see generally* 9 Ind. Law Ency., Damages S 193 (1971). Where sufficient evidence has been lacking, Indiana courts have modified damage awards. In *Jerry Alderman Ford Sales, Inc. v Bailey,* 291 N. E. 2d 92 (Ind. 1972), the buyer

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[4]Counsel for the plaintiffs so stated at oral argument, and admitted as much in his briefs on appeal. In his summation to the jury, counsel said that the value of plaintiffs' losses was incalculable.

of a truck sued the seller, primarily for breach of warranty. The jury awarded the plaintiff $35,000 in compensatory damages and $17,500 in punitive damages. Ten thousand six hundred fifty dollars of the compensatory award was the purchase price of the truck; the remainder was for the plaintiff's lost profits. The appellate court examined the evidence and found that it did not support the amount of the jury's verdict for lost profits because the plaintiff's proof showed that her lost profits totaled only $3,200. Accordingly, it instructed the trial court to modify the judgment downward. *accord' Kroger Co. v Hann*, 379 N. E. 2d 369 N.E. 2d 1117, 1132-34 (Ind. 1978). Therefore, the amount of the jury's verdict exceeding $109,499 is too speculative to be sustained.

II

Plaintiffs contend that the district court should not have dismissed their tort claim and that the district court's failure to allow them to reinstate it was an abuse of discretion. We disagree. Under the circumstances of this case, TIA is not liable in tort for the negative effects its breach of contract may have had on the plaintiffs' contractual relationships with third parties. *See generally* Prosser, Law of Torts S 129 (4th ed. 1971). Moreover, plaintiffs failed to allege any conduct on the part of TIA which interfered with their business relationships with any outside party. The district court's grant of partial summary judgment for the defendant on this aspect of the case was proper and is affirmed.

The judgment of the district court is affirmed in part, vacated in part, and remanded with directions to modify the judgment by reducing the amount of plaintiffs' recovery to $109,499.00.

APPENDIX B

ORGANIZZAZIONE NAVOBI ITALIANA
(Uruguay), S. A. and
ORGANIZZAZIONE NAVOBI ITLAIANA
Plaintiffs-Appellees,
Cross-Appellants,

versus

TRANS INTERNATIONAL AIRLINES,
Defendant-Appellant,
Cross-Appellee.

Nos 79-1841 & 1842

United States Court of Appeals
Seventh Circuit

April 10,1980

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.

Before SUTHER M. SWYGERT and PHILIP W. TONE, Circuit Judges and NICHOLAS J. BUA, District Judge.*

No. IP 75-601-C

WILLIAM E. STECKLER, Judge.

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*The Honorable Nicholas J. Bua, District Judge from the Northern District of Illinois, Eastern Division, is sitting by designation.

On consideration of the petition for rehearing filed in the above-entitled cause by counsel for the plaintiffs-appellees, cross-appellants, all of the judges on the original panel having voted to deny the same.

IT IS ORDERED that the aforesaid petition for rehearing be and the same is hereby DENIED.

APPENDIX C

ORGANIZZAZIONE NAVOBI ITALIANA
(Uruguay), S. A. and
ORGANIZZAZIONE NAVOBI ITALIANA
Plaintiffs,

versus

TRANS INTERNATIONAL AIRLINES,
and ACL AGENCIES, INC.,
Defendants.

CAUSE NO. IP 75-601-C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DEFENDANT'S MOTION FOR RULING ON
AFFIRMATIVE DEFENSE
OF FAILURE TO STATE A CLAIM

Comes now the Defendant, TIA, by counsel, and moves the court to rule on the affirmative defense of failure to state a claim upon which relief can be granted as to the cause of action for "tortious interference with contracts", and requests that said ruling be made prior to trial in order to expedite the trial of this cause.

DANN PECAR NEWMAN
TALESNICK & KLEIMAN

BY:_____
David H. Kleiman
Attorneys for
Defendant, TIA.

CERTIFICATION OF COPY SERVICE

I hereby certify that copies of the above and foregoing were personally delivered this 16th day of March, 1979, to all counsel of record, to-wit:

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APPENDIX D

THE COURT: The Court would have the record show the Court met with counsel in chambers for the purpose of discussing the defendant's motion for ruling on affirmative defense of failure to state a claim. The Court pointed out to counsel that this motion was filed at a rather untimely date, to wit: March 16, 1979.

The Court was informed the defendant's answer to the third amended complaint was filed in November. In the interim a motion for summary judgment was filed and the Court ruled on that motion with regard to - - well, the Court overruled the motion for summary judgment but we now have the case at a point where the Court must decide at some point in the trial whether the plaintiff's theory of malicious interference with the contract is a valid theory.

As the Court pointed out to counsel, I have done a considerable amount of reading over the weekend and in that regard I again allude to the fact that this motion filed by the defendant asking for a ruling on the affirmative defense of failure to state a claim was not filed until 1:00 P. M. last Friday. The Court indicated to counsel that it has a very serious question in mind as to whether this theory of the plaintiff should be submitted to the jury. It does not appear to the Court from what the Court has read in the files of this case that there is a valid cause of action for malicious interference with the contract. I indicated to counsel the Court could withhold this ruling and hear the evidence and at a later stage in the trial either grant or deny the defendant's motion based on the motion to dismiss for failure to state a claim under the malicious interference with the contract theory. I pointed out to plaintiff's counsel it might be more

detrimental to the plaintiffs' postion to have this issue withdrawn from the jury's consideration at a later stage in the trial than if the Court were to grant the motion today.

After hearing counsels' argument the Court has decided that it will withhold ruling on the motion to dismiss the cause of action based on malicious interference with the contract until after I have heard more evidence or after I have a more factual background of the controversy here to be tried.

Again, I remind counsel the Court's belief is that this theory of the plaintiff is being tendered primarily as a basis to place before the jury the question of consequential damages and if the Court allows this theory to remain in the record I will, of course, have to allow evidence to come in concerning contracts with third parties and that is the very thing the defendant objects to and claims it would be prejudicial to the defendant's position.

I will be glad to hear from counsel on the record. Mr. Kleiman.

MR. KLEIMAN: Thank you, Your Honor. Your Honor, as I indicated in chambers I'm sorry if it made it difficult for the Court and I'm certain it did to have brought this matter to the Court's attention at such a late date, I think the record will show, however, that our motion for summary judgment dealing with the damage issue on the occurrence matter was filed - - I'm sorry, I don't have the record with me, but it was filed long before trial, the matter was briefed and argued and briefed again and argued several times and the Court did grant our motion in part and overruled it with regard to the interference matter.

Shortly thereafter, we did ask for the ruling on the cause of action itself. I might indicate the reason we did not bring it up earlier was because we were dealing with the issue of the consequential damages both on the cause of action for contract and for tortious interference. It was our belief that the ruling on those issues would be the same, we thought that would be what would happen, at least that was our mental process, and if that had occurred then the entire cause of action for malicious prosecution or malicious interference really becomes almost for all practical purposes a moot matter, as the Court alluded the purpose of filing the motion is obviously to bring evidence before the jury which would not properly be brought in a contract case.

That is the matter I would like to repeat and make the record on.

We do feel that to allow evidence of matters which go beyond foreseeability which is essentially the question we deal with in this case would be prejudicial and may well amount to error in that the jury would have to somehow attempt to deal with the question of damages for one cause of action which could not be allowed in the other cause of action based on the Court's prior ruling on the motion for summary judgment. So we do feel compelled to make a record in terms of our position and we will, of course, have to renew our request for a ruling at the time any evidence is offered which would go beyond evidence which would be properly foreseeable under a contract cause of action. As we indicated, we would be willing to have a preliminary hearing or anything of that nature the plaintiff feels may be necessary to bring out any evidence they think would influence the Court. Essentially our position is set out in our brief which accompanied our motion. I think there are really essentially two issues.

The first is it was a legal matter, what has been alleged to be the cause of action is the failure to have an airplane take off from Indianapolis. Our point on that issue is that there is no duty to do anything of that nature. I might point out this cause of action is specifically pleaded as an alternative contract cause of action and saying if there is no contract then you were obligated to fly the plane and didn't interfere.

In order to have an obligation there has to be a duty and there is no duty that has been alleged at any point in the contract saying we had a duty to fly the plane if we did not have a contract. If we had a contract we would merely have a contract cause of action and their second point is, and the record I think is clear on this, and if the plaintiff is attempting at this point to change his cause of action we would most adamantly object but the cause of action is pleaded as malicious interference with the contract. It is set out in the pretrial order as such and the elements of such a cause of action are clearly set out in Monarch Industrial Towel Uniform versus Model Coverall which is cited in our brief which clearly requires, among other things, an inducement. I might point out in that particular case the Court dismissed the complaint saying there was no inducement pleading. That case is probably the best possible authority for our position because it not only sets out - -

THE COURT: Which case are you referring to?

MR. KLEIMAN: Monarch Industrial Towel, it not only sets out elements one, two, three, four, five, but then specifically discusses the one which we have raised that there is no inducement, pleading no one was induced to breach a contract, that is exactly the case in the Monarch situation where the trial court dismissed the complaint and the Appellate Court upheld that dismissal saying unless you can plead

an inducement to breach a contract you don't have a tortious interference with a contract.

Thank you.

THE COURT: Mr. Miles.

MR. MILES: Your Honor, I will attempt to be brief. In response to the first aspect of the defendant's motion, technical aspect, a motion brought under Rule 12(b)6 such as this has been with reference to the facts of the case at stake. I might point out 12(b)6 assumes that all allegations plead are, in fact, true, since they have relied on facts outside of the pleadings in support of their motion, then undet the concepts of Rule 12 is to be treated as a Rule 56 motion. Rule 56 requires notice ten days prior to hearing. I recieved notice on the 16th of March that this motion had been brought by the defendant. I did not have time to even type a reply and I apologize to the Court for this. The weekend has been quite long.

The second point on the technical aspect is that under the Federal Rules of Civil Procedure which, of course, will govern this case and the pleadings, we have had several pretrial conferences, three or four, I can't remember, but there have been three or four, there have been several pretrial orders entered in reference to this case, including a couple which the Court requested the plaintiff set out a statement of facts. In those pretrial orders I have clearly indicated the natue of the action which I am bring under the tort theory and would, of course, submit under Rule 16 these pretrial orders as well as the various answers I have given to the defendant's interrogatories for over the last three and half years adequately conveyed that the defendant airline was well aware of the basis of my suit. The fact is they did not

plead this failure to state a claim until the last amendment which was based on negligence which I concede I do not have a cause of action for . . .

THE COURT: For the record, the Court has before it an extremely critical ruling to make. The defendant filed a motion for ruling on affirmative defense of failure to state a claim. This motion was filed on March 16, last Friday, at 1:00 P. M. The Court reviewed the motion, I did not have the opportunity to research the question to my satisfaction. I have not had the benefit of a responsive brief form the defendants, I mean from plaintiffs, and this - - and dealing with the matter that is so critical could materially affect the course of the entire trial.

I had hoped to be able to make a ruling on the motion before the opening statements were to be made. After hearing counsel in chambers during the last 20 or 30 minutes I have concluded the better course for the Court to follow is to recess the trial at this time, giving the plaintiffs the opportunity to file any responsive answer to the defendant's motion and a memorandum in support of the motion and hear you out further tomorrow morning out of the presence of the jury so that the Court can make a ruling.

For the benefit of the record, and those who are parties to the action, we have presently a lawsuit that has been reduced down to tow principal theories. The first theory is a simple theory easily understood. The theory being nothing more than an alleged breach of contract, the breach having been committed on the part of Trans International Airlines, that is the simple question.

The other theory that gives the Court the problem in respect to the defendant's motion for a ruling on its affirmative defense, a failure to state a claim, is as I have said so critical the Court feels it must rule on it before the jury is led to believe that we are trying the case on both theories. If we try it on only the one theory the evidence will be much shorter I should think. If we try it yet on both theories I believe the evidence will be much more involved. As yet the plaintiff has not cited a single case to the Court that satisfied the Court's mind that the allegations of the complaint state a cause of action for malicious interference with the contract. At least not under the Indiana law, if we are to apply the Indiana law.

Over the noon hour I had the opportunity briefly to review some of the case law that is being argued and I can only point to the fact that the defendant appears to be on solid ground when the defendant argues that in Indiana the ruling case law is the law as laid down in so-called - - the so-called Monarch case. In the case of Monarch Industries, et cetera, versus Model Coverall Service, 381 N.E. 2d 1098 the Court stated the following:

Plaintiff-appellant, Monarch Industrial Towel and Uniform Rental, Inc. (Monarch), filed a complaint of tortious interference with a contractual relationship against Model Coverall Service, Inc. (Model). Monarch alleged that Model committed said tort by inducing Emmert Trailer Company (Emmert) to breach its uniform rental service contract with Monarch. Emmert executed a similar contract with Model after terminating the contract with Monarch. Following Monarch's presentation of evidence at trial court granted Model's motion for judgment on the evidence pursuant to Indiana Rules of Procedure, Trial Rule 50. Monarch perfected this appeal arguing that the court erred in granting

Model's motion for judgment on the evidence and in refusing to allow Monarch to reopen its case. Indiana recognizes the tort of interference with contract relationships by inducing a breach of contract and has defined the essential elements which must be proved for recovery under such an action in Daily versus Nau, 1975, Indiana Appellate 339, N. E. 2d 71, at 76 as follows:

1. Existence of a valid and enforceable contract. I don't think there is any argument in regard to that particular issue. The plaintiff said there was an enforceable contract. The defendant says there was not.

2. Defendant's knowledge of the existence of the contract. Plaintiff claims the defendant had full knowledge of the existence of the contract between the plaintiffs and others and Uruguay - - in Italy and Uruguay, so the second does not give the Court any problem.

Paragraph number 3 is the element that gives the Court pause and I am undicided. Number 3. This is one of the exxential elements. Defendant'a intentional inducement of breach of the contract and this is where the argument lies, the defendant claims there is no allegation in the complaint of any inducement performed by the defendant to induce the breach of a contract. As I understand the pleadings. Number one, the plaintiff contends - - the defendant contends - - there was no contract. The plaintiff says ther was a contract. Plaintiff says even if there was no contract nevertheless plaintiff has the right to bring an action for damages for alleged malicious interference with the contract because the defendant intentionally withheld the flight and thus interfered with the contract between the plaintiffs and Uruguay and the other potential purchasers of the cattle.

I might also add all of the case law plaintiff has cited to me are cases involving alleged conspiracies to control a certain market. To control sales of lumber in one case. All these cases seem to involve a conspiratorial course of conduct or an inducement to cause one party to breach the contract at the detriment of the person who brings the lawsuit. This case, the Monarch Industries case, is the case the defense is relying upon very firmly and I will say it seems to be strongly in favor of the defense position. That is in regard to that third element.

The defendant's intentional inducement of a breach of the contract. The defendant's claim, the defendant did not know about the contracts. That is a matter of proof.

The fourth essential element under the Indiana case law does not give us any particular problem. The absence of justification for the inducement to breach the contract under the Indiana law.

Paragraph 5, damages resulting from defendant's wrongful inducement of the breach.

Now, this is the latest law in Indiana in regard to the essential elements of a cause of action for alleged malicious interference with a contract. Frankly, I do not have the final answer in mind at this time with regard to the argument the plaintiff now makes that there need be no contract between the plaintiff and the defendant. You are saying even if there was no contract between the plaintiffs and the defendant the fact that the defendant did not make this flight maliciously interfered with the contract between the plaintiffs and Uruguay and the other purchasers of cattle in Italy. That is what you are saying in your complaint, you have said that.

Now, this gives me a lot of difficulty. So I want to go into the law a little more fully and give you, the plaintiff, an opportunity to come back with any brief you might have or any additional cases.

We have argued many different aspects of this problem, among which were motions for leaves to amend the pleadings requirement the Court should allow the pleadings to be amended to conform to the evidence and other aspects of this problem. I can only repeat what I have said in chambers. I regret that the defendant's motion came on the eve of trial but they had a right to assert. The defendants had the right -- the defendant had the right to assert this motion at any stage of the trial although we do have local rules and those local rules were not met. Namely, that when a motion is filed under Rule 12(b)6 that there should be briefs in support of the defense, the defense of failure to state a claim, our local rules require supporting briefs, I did not have that. We are in the first stages of the trial and we have this very critical ruling that should be made.

So we are going to recess for the day and I want to go into the law more fully and hopefully we will be able to make a ruling tomorrow morning . . .

(Court convened at 10:00 o'clock A. M. and the following proceedings were had outside the presence of the jury).

THE COURT: For the record, the Court would state the Court has labored with the defendant's motion for a ruling on affirmative defense for failure to state a claim and the Court in dealing with counsel in chambers in regard to the motion recognizes the Court has vacillated from one side to the other on the ground that the law in Indiana in respect to the argument posed by the plaintiffs has not been squarely dealt with.

The Court has announced to counsel in chambers that it was distressed over the fact the defendant's motion was filed at such an untimely date, namely, the day before the commencement of the trial. This not only places the plaintiff in the position of disadvantage, it also places the Court in a position of disadvantage from dealing with the very intricate and complex legal questions that have been raised.

The defendant is relying almost exclusively upon the case of Monarch Industrial Towel and Uniform Rental, Inc. versus Coverall Service, Inc. - - I wish to correct that - - that is correct. The defendant is relying on the case of Monarch Industrial Towel and Uniform Rental, Inc. versus Model Coverall Servicing. The language in that case upon which the defendant relies appears to be this: "Indiana recognizes the tort of interference with contract relationships by inducing a breach of contract and has defined the essential elements which must be proved for recovery under such an action. In Daily versus Nau, 1975, Indiana Appellate 339 N. E. 2d 71 at 76, as follows: 1. Existence of a valid and enforceable contract. 2. Defendant's knowledge of the existence of the contract. 3. Defendant's intentional inducement of breach of the contract. 4. The absence of justification, and 5. Damages resulting from defendant's wrongful inducement of the breach."

Plaintiffs on the other hand argue that this is not the total ambit of the law by which the Court should be guided. That the theory of tort law allowing recovery for malicious interference with a contract is not limited solely to the element of inducement but that the law goes beyond that and allows recovery for any malicious interference with a contract.

Plaintiffs would argue any malicious interference, including the malicious breach of a contract, which affects the

plaintiffs' opportunity to perform contracts with other third persons is actionable.

Now, what has compounded the problem is the fact that counsel were required to specify the theories upon which this action would proceed to trial and plaintiffs, through counsel, specifically specified that it was proceeding on the theory of a malicious interference with a contract.

Plaintiffs point out, however, that it is not taking the position that it is limited to the malicious inducement of the breach of a contract but that it is proceeding only on the theory of malicious interference and I assume it means - - they mean by that the malicious breach of a contract that thereby deprived the plaintiffs of the advantages of performing additional contracts upon which they depended upon the initial contract between the plaintiffs in this action and the defendant Trans International Airlines.

Now, by the plaintiffs specifying specifically the theory upon which they were proceeding the Court is met with the argument by the defense that the Court here would be contrary to the Indiana law as laid down by the Indiana Appellate Court and that this places the defendant in a position of disadvantage because the defendant prepared its defense on the basis of the announced theory upon which the plaintiff would proceed, namely, malicious interference with the contract.

The Court has informed counsel, number one, that it was met with an untimely motion, in a sense. I realize the rules permit the filing of a motion to dismiss a cause of action for failure to state a claim at any time, including during the trial. So the Court is confronted with that problem. I have decided that I am going to sustain the defendant's motion for

ruling on the affirmative defense of - - for failure to state a claim.

So that will be the Court's ruling. It has been an extremely difficult problem that has been posed by this late motion. I realize this may jeopardize the plaintiffs to some degree in presenting their case to the jury and to the Court.

APPENDIX E

ORGANIZZAZIONE NAVOBI ITALIANA
(Uruguay), S. A. and
ORGANIZZAZIONE NAVOBI ITALIANA

versus

TRANS INTERNATIONAL AIRLINES

NO. IP 75-601-C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ORDER

This matter is before the Court on defendant's motion for judgment notwithstanding the verdict and in the alternative, for a new trial or to amend the verdict. Fed. R. Civ. P. 50(b), 59(a), (e).

On April 2, 1979, the jury awarded plaintiff Organizzazione Navobi Italiana a verdict of $60,000.00, and plaintiff Organizzazione Navobi Italiana (Uruguay), S. A. a verdict of $350,000.00.

Defendant moves for judgment notwithstanding the verdict. The Court has no discretion in ruling on such a motion. It should consider only the question of law of whether there was sufficient evidence to raise a jury issue. *See* 9 C. Wright & A. Miller, Federal Practice and Procedure S 2531, at 575 (1971). The motion is supported with ten arguments. These arguments fall into four basic categories: (1) insufficient evidence; (2) admission of hearsay evidence; (3) improper instructions; and (4) improper damages were allowed.

First, defendant argues that there was insufficient evidence to establish: (1) the existence of an agency relationship between it and Incontrans or A. C. L. Agencies, Inc.; (2) a contract between it and O. N. I.; (3) a contract between it and O. N. I. U. S. A.; (4) a breach of contract; and (5) lost profits of O. N. I. or O. N. I. U. S. A. As mentioned previously, the test is not whether such evidence was shown, but rather whether the evidence introduced raised a jury issue. The Court concludes, after hearing the evidence presented, that reasonable men could differ on these issues and that it would be inappropriate to grant defendant's motion for judgment in its favor.

Second, defendant argues that plaintiff's exhibits 5 and 6 should not have been admitted since they were hearsay. The Court concludes, however, that these exhibits were properly admitted.

Third, defendant contends the Court gave improper instructions. Defendant argues that Instruction No. 26 is erroneous because there can be no implied agency. However, Indiana law clearly recognizes that agency may be implied from the words and conduct of the parties. *See Heffner v White* 113 Ind. App. 296, 45 N. E. 2d 342, 346 (1942); Indiana Law Encyclopedia "Agency" S 3, at 310 (1957).

Defendant further argues that Instruction No. 34 is erroneous for three reasons. First, because it does not inform the jury that the principal must receive a benefit from ratification. It should be noted that the instruction does state that the act of the agent must appear to be "performed for and on account of the principal." This is sufficient. *See Bryan v Pommert*, 110 Ind. App. 61, 37 N. E. 2d 720, 723

(1941); Indiana Law Encyclopedia "Agency" S 121, at 379 (1957). Defendant's second argument is that the principal must have full knowledge of the situation. The instruction read, however, that a principal can be liable "if, with knowledge of the act, he thereafter ratifies." Defendant finally argues that there is no implied ratification theory. This is incorrect. *See Wright v State,* _____Ind. _____, 363 N. E. 2d 1221, 1225 (1977); Indiana Law Encyclopedia "Agency" S 124, at 382 (1957).

Fourth, defendant argues that (1) there was insufficient evidence to support a damage award in excess of $109,500.40; (2) The Court failed to implement its order of March 5, 1979, on the damage issue; and (3) the damages awarded were not foreseeable. Quite clearly, even if all of these damage arguments are entirely valid, judgment should not be entered for the defendant. This is because none of these arguments goes to the question of defendant's liability. which is the crux os entering a judgment for defendant.

Alternatively, defendant argues that the Court should amend the judgment to reflect damages not to exceed $109,500.40. Defendant contends that damages in excess of that sum are speculative. However, the Court concludes that the damages award given by the jury was not speculative.

Defendant further moves for a new trial. A verdict may be set aside and a new trial granted when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of sound discretion the trial judge thinks this action is necessary to prevent a miscarriage of justice. *See generally* 9 C. Wright & A. Miller, Federal Practice and Procedure S 2531, at 575-77 (1971). In this case, the Court concludes that the verdict is not against the clear weight of the evidence. Accordingly, no new trial will be ordered.

By reason of the foregoing, the Court concludes:

(1) defendant's motion for judgment notwithstanding the verdict in DENIED;

(2) defendant's alternative motion to amend the judgment is DENIED;

(3) defendant's alternative motion for a new trial is DENIED;

IT IS SO ORDERED'

Dated this 12th day of June, 1979.

UNITED STATES DISTRICT JUDGE